(16)

Supreme Court, U.S.
FILED
OCT 9 2002
CLERK

No. 01-1107

In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

BARRY ELTON BLACK, RICHARD J. ELLIOTT, AND JONATHAN O'MARA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF OF PETITIONER

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

MAUREEN RILEY MATSEN
WILLIAM E. THRO
Deputy State Solicitors

ALISON P. LANDRY
CHRISTY A. MCCORMICK
Assistant Attorneys General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. THE VIRGINIA STATUTE IS CONTENT-NEUTRAL	1
A. The Virginia Statute Applies Regardless of Secondary Messages That Might Accompany the Message of Intimidation	1
B. Cross Burning and Flag Burning Are Readily Distinguishable	3
C. Virginia May Focus on Those Symbols of Intimidation That Are the Most Problematic	4
D. The Content-Neutrality of the Statute Is Not Affected by the Existence of "Other Options"	5
E. The Virginia Statute Is Consistent with the *O'Brien* Standard	7
II. EVEN IF VIRGINIA'S STATUTE IS CONTENT-BASED, IT IS CONSTITUTIONAL UNDER THE THREE EXCEPTIONS DESCRIBED IN *R.A.V.*	8
A. Cross Burning Is an Especially Virulent Form of Intimidation	8
B. Cross Burning Has an Array of Secondary Effects	11
C. No Official Suppression of Ideas Is Afoot	12
III. THE STATUTORY INFERENCE IS CONSTITUTIONAL	13

TABLE OF CONTENTS – Continued

Page

A. There Is No Real Overbreadth..... 14

B. There Is No Substantial Overbreadth 20

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Free Speech Coalition,
122 S.Ct. 1389 (2002) 14, 15, 16

Barnes v. United States,
412 U.S. 837 (1973). 19

Black v. Commonwealth,
553 S.E.2d 738 (Va. 2001) 17

Boos v. Barry,
485 U.S. 312 (1988) 12

Brandenburg v. Ohio,
395 U.S. 444 (1969) 14, 16, 17, 18

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 13, 20

Burson v. Freeman,
504 U.S. 191 (1992) 4

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 7

Friedman v. Rogers,
440 U.S. 1 (1979) 4

Leary v. United States,
395 U.S. 6 (1969) 19

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 12

New York Trust Co. v. Eisner,
256 U.S. 345 (1921) 3

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Rankin v. McPhearson,
483 U.S. 378 (1987) 10

Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 11

Sandstrom v. Montana,
442 U.S. 510 (1979) 14

Sandstrom v. Montana,
603 P.2d 244 (Mont. 1979) 14

Semler v. Oregon State Bd. of Dental Exam'rs,
294 U.S. 608 (1935) 6

State v. T.B.D.,
656 So. 2d 479 (Fla. 1995) 2, 19

Stromberg v. Carlson,
283 U.S. 359 (1931) 14, 15, 16, 17

Texas v. Johnson,
491 U.S. 397 (1989) 3

United States v. Eichman,
496 U.S. 310 (1990) 3

United States v. O'Brien,
391 U.S. 367 (1968) 4, 7

United States v. Playboy Entm't Group, Inc.,
529 U.S. 803 (2000) 11

Watts v. United States,
394 U.S. 705 (1969) 6, 10

Whitney v. California,
274 U.S. 357 (1927) 7

Wisconsin v. Mitchell,
508 U.S. 476 (1993) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 871 ..... 6, 9, 10

Va. Code § 18.2-423.01 5

OTHER

L. Carroll, *Alice's Adventures in Wonderland* (1865) 2

INTRODUCTION

Respondents' brief is striking in that it seeks nothing less than a fundamental alteration of this Court's well-settled First Amendment jurisprudence. First, because symbols can be used to convey a wide variety of messages, respondents assert that the Commonwealth cannot criminalize the use of a burning cross as a tool of intimidation. Second, respondents take the position that a content-based regulation of proscribable expression can never be constitutional. Their position is directly contrary to this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which clearly recognized that, in certain limited instances, government may engage in content discrimination in its regulation of proscribable expression. Third, while criminal statutes regularly assign an inference to some specific evidence, respondents insist that this is unconstitutional when the evidence might also be regarded as symbolic expression. None of these propositions finds any support in this Court's jurisprudence and all must be rejected.

ARGUMENT

I. THE VIRGINIA STATUTE IS CONTENT-NEUTRAL.

A. The Virginia Statute Applies Regardless of Secondary Messages That Might Accompany the Message of Intimidation.

Respondents appear to acknowledge that the Virginia statute does *not* "single out an identifiable perspective on the ideological or political spectrum." Resp. Br. at 7. They recognize that the Virginia statute – unlike the St. Paul ordinance at issue in *R.A.V.* – is not limited to speech aimed at "race, color, creed, religion or gender" or at any other category. *Id.* (quoting *R.A.V.*, 505 U.S. at 380). Although such impartiality demonstrates that the Virginia statute is content-neutral, respondents insist that the statute is content-based because it focuses on a particular

symbol. They seem to regard the symbol of a burning cross as an empty vessel into which different speakers might pour whatever content they desire, and they view the Virginia statute as discriminating against these yet-to-be-chosen messages. The argument is flawed for several reasons.

First, respondents fail to recognize that, just as words acquire their meaning by usage, so do symbols.[1] In the lexicon of American society, a burning cross – standing alone and without explanation – is understood by perpetrator and victim alike as a symbolic threat of violence.[2] *See State v. T.B.D.*, 656 So. 2d 479, 481 (Fla. 1995); United States Br. at 3-5. This is the message the Virginia statute prohibits, and this Court has made it clear that such a prohibition is constitutional. *R.A.V.*, 505 U.S. at 388.

Second, as respondents recognize, different speakers might sometimes intertwine their messages of intimidation with different secondary messages, and those secondary messages could be constitutionally protected. Resp. Br. at 17-18. One such secondary message might be advocacy of the bigoted views espoused by the Ku Klux Klan. *See* Com. Br. at 6-7 (describing rhetoric at Klan rally led by Black). Another might be resentment that a neighbor has challenged the discharge of firearms in a residential area. *See* Com. Br. at 3-4 (describing actions by Elliot and O'Mara). Even so, the Virginia statute does not favor or disfavor any such secondary messages. It is

---

[1] Respondents' position is reminiscent of Humpty Dumpty in Lewis Carroll's *Alice in Wonderland*. "'When I use a word,' Humpty Dumpty said in rather scornful tone, 'it means just what I choose it to mean – neither more nor less.'" L. Carroll, *Alice's Adventures in Wonderland* (1865).

[2] If government were to ban some symbol having no recognized meaning – a truly empty vessel – such a quirky regulation of speech would likely violate the First Amendment, but not because of any discrimination based on content or viewpoint.

entirely neutral as to any and all such messages. Thus, the Virginia statute is fundamentally different from the ordinance at issue in *R.A.V.*

The St. Paul ordinance did not treat all secondary messages alike. Secondary messages addressing certain topics – "race, color, creed, religion or gender" – were banned when linked to fighting words. *R.A.V.*, 505 U.S. at 391. However, secondary messages addressing other topics – "political affiliation, union membership, or homosexuality" – were not affected. *Id.* The fact that the ordinance proscribed only certain secondary messages while permitting others was quintessential content discrimination that rendered the statute constitutionally defective. The Virginia statute applies to *all* acts of burning a cross with intent to intimidate regardless of *any* secondary message that might be conveyed. Thus, the Virginia statute is content-neutral.

B. Cross Burning and Flag Burning Are Readily Distinguishable.

Respondents repeatedly assert that cross burning is analogous to flag burning, an act that is constitutionally protected. *See* Resp. Br. at 9-11, 35, 38. Superficially, the analogy might seem appealing; but, in this regard, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). Given our history, flag burning and cross burning are fundamentally different. Those who burn a flag – any flag – typically do so in order to express ardent – and disrespectful – opposition to the government or to some idea that the unburned flag is viewed as representing. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). By contrast, cross burning is typically not intended to express opposition to Christianity or to any other idea that an unburned cross might conceivably represent. Crosses are burned to instill fear. Thus, when a legislature prohibits burning the American flag, it is targeting a protected message: dissent from the values or

policies the flag represents. In contrast, when a legislature bans cross burning with the intent to intimidate, the only message it targets is intimidation – and intimidation is not protected.

C. Virginia May Focus on Those Symbols of Intimidation That Are the Most Problematic.

Respondents contend that, because cross burning may be used to convey messages other than intimidation, Virginia may not ban it – even where the ban is limited to intimidation. In respondents' view, the Commonwealth must either ban all symbols as tools of intimidation or ban none; it may not focus on those symbols of intimidation that are the most problematic. Their position has no foundation in this Court's jurisprudence and would lead to extreme results.

1. As the United States points out in its brief in support of Virginia, the Constitution permits a State to narrow its focus. United States Br. at 24-25. Upholding a state regulation of optometrist's trade names to prevent misleading or deceptive advertising, this Court noted that "[t]here is no requirement that the State legislate more broadly than required by the problem it seeks to remedy." *Friedman v. Rogers*, 440 U.S. 1, 15 n.14 (1979). Virginia has reasonably identified intimidation by cross burning as a particularly serious evil and has thus enacted a statute focused on that particular activity. *See United States v. O'Brien*, 391 U.S. 367, 375 (1968) (upholding a statute punishing the destruction of draft cards but not other government documents). Virginia is not required to ban the burning of circles or squares or other geometric designs or to treat all tactics of intimidation alike. *See Burson v. Freeman*, 504 U.S. 191, 207 (1992) ("States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist."). Virginia is free to criminalize only a particular act of intimidation that

presents a special risk of harm to the Commonwealth and its citizens.

2. The position advocated by respondents would lead to extreme results. Virtually any symbol used to intimidate has the potential to convey a message that is protected. For example, brandishing or discharging a firearm in the presence of another is often intended – and understood – as an act of intimidation. Yet, the display of such a weapon might also be used symbolically to convey a constitutionally protected message, such as expressing support for the right to keep and bear arms, or emphasizing the intensity of the speaker's views about war and peace or some other issue of public policy. The discharge of such a weapon might also be used to celebrate some victory or to honor a fallen hero, as is done at military funerals. Yet, surely the capacity of weapons to convey protected messages does not preclude government from enacting laws that prohibit brandishing or discharging firearms with the intent to intimidate. So it is with cross burning. The fact that a burning cross might conceivably be used to convey some constitutionally protected message does not preclude Virginia from making the act unlawful when it is intended to intimidate.

D. The Content-Neutrality of the Statute Is Not Affected by the Existence of "Other Options."

Respondents attempt to persuade this Court that the statute is not content-neutral by suggesting other ways in which the same intimidating activity might be prohibited. They say there are "no valid governmental interests underlying cross-burning statutes that cannot be vindicated" through some other statute. Resp. Br. at 23.[3] But,

---

[3] As an example of a statute they find acceptable, respondents cite a newly-enacted Virginia law, Va. Code § 18.2-423.01, that prohibits

(Continued on following page)

their protestation is irrelevant. The availability of other options is not the test of whether the option chosen is content-neutral or constitutional. The Constitution does not require the Commonwealth to "strike at all evils at the same time or in the same way." *Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935). Cross burning is an especially virulent form of intimidation from the standpoint of both the victim and the community at large. *See* Com. Br. at 32-40. For the legislature to strike first and foremost at such an evil makes perfect sense. Conversely, to declare that Virginia may not differentiate between cross burning and less virulent, more obscure acts of intimidation would disregard a sense of proportion, undermine law enforcement priorities and risk dissipating public contempt for this intimidating conduct.

Moreover, respondents' logic would necessarily overturn the federal statute making it illegal to threaten the President, 18 U.S.C. § 871. According to their argument, that statute would be unconstitutional because there are other ways to vindicate the valid governmental interests it serves, without singling out the President. For example, a statute might prohibit threats against any elected official or against any federal employee. Yet, this Court has twice made it plain that the presidential threat statute is constitutional. *R.A.V.*, 505 U.S. at 388; *Watts v. United States*, 394 U.S. 705, 707 (1969). Thus, respondents'

---

burning *any* object with the intent to intimidate. The Commonwealth agrees that the new statute is content-neutral, but it is unclear why respondents think so. A burning cross combines two symbolic components: the cross and the fire. The new statute removes specific mention of one symbol: the cross. Yet, it leaves in place the other symbol: fire. If this Court finds that focusing on cross burning makes the challenged statute unconstitutional, it is only a matter of time before someone challenges the new statute because of its focus on fire. Indeed, the veiled hint of a possible challenge is found in one of the *amicus* briefs, which describes the new statute as "less objectionable" but stops short of conceding that it is constitutional. *See* Rutherford Institute Br. at 9.

argument about "other options" is plainly at odds with established First Amendment jurisprudence.

E. The Virginia Statute Is Consistent with the *O'Brien* Standard.

As an alternative means of assessing content-neutrality, this Court should follow the suggestion of the United States and apply the standard articulated in *O'Brien*. *See* United States Br. at 22-23. Indeed, this Court has consistently applied the *O'Brien* standard where, as in this case, the challenged statute seeks to regulate activities that involve both expression and conduct. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984) (upholding ban on camping in Lafayette Park and National Mall).

Under the *O'Brien* standard, the Virginia statute must be upheld if it promotes an "important or substantial governmental interest" that is "unrelated to the suppression of free expression" and if the statute restricts expression only to the extent "essential to the furtherance" of the substantial governmental interest. *O'Brien*, 391 U.S. at 377. The Virginia statute clearly meets this standard. Its purpose is to prevent an especially virulent form of intimidation. Whether the intimidating symbol is planted in a private lawn, or nearby street or some other public place, this purpose is both substantial and completely unrelated to the suppression of protected expression.[4] Further, because cross burning is prohibited only if it is intended to

---

[4] Respondents note "that fear breeds repression; that repression breeds hate; [and] that hate menaces stable government. . . . " Resp. Br. at 38 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). It was precisely to prevent the fear inspired by cross burning – and to stop this downward spiral at the outset – that Virginia enacted the statute at issue. *See* Com. Br. at 221-24, 38-40.

intimidate, the statute restricts expression only to the extent essential to the furtherance of that interest.[5] Thus, the law is constitutional.

II. EVEN IF VIRGINIA'S STATUTE IS CONTENT-BASED, IT IS CONSTITUTIONAL UNDER THE THREE EXCEPTIONS DESCRIBED IN *R.A.V.*

Respondents' discussion of the three *R.A.V.* exceptions is founded on their hope that this Court did not mean what it said when it decided that landmark case. They insist that an absence of content-neutrality is fatal *per se*, even where – as here – only intimidation is proscribed.[6] *R.A.V.* says otherwise. The three exceptions it articulates come into play only *after* it is determined that a challenged statute lacks content-neutrality. 505 U.S. at 388-390. Even if the Virginia statute were deemed to be content-based, it would still be constitutional under each of these exceptions.

A. Cross Burning Is an Especially Virulent Form of Intimidation.

The Commonwealth has shown that cross burning is an especially virulent form of intimidation because it

[5] While application of the *O'Brien* standard is appropriate in all venues named in the statute, it is especially appropriate where – as in the case of Elliott and O'Mara – the cross burning occurs in conjunction with a trespass onto the property of another. "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993). Neither are trespass or vandalism, which are physical assaults on the property of another.

[6] *See* Resp. Br. at 37 ("The pivotal question here . . . is whether the statute's focus on cross-burning is sufficient to render it content-based or viewpoint-based.").

demonstrates with "special force" why "threats of violence are outside the First Amendment." Com. Br. at 32 (quoting *R.A.V.*, 505 U.S. at 388). Respondents' brief does not challenge this assessment. Indeed, respondents appear to agree that intimidation by cross burning is especially virulent, saying: "It is not the fire that burns hotter when flaming sticks are crossed, but the passions that the fire inflames." Resp. Br. at 6. The chief passion thus inflamed is the victim's fear.[7] Yet, respondents contend that this is not what the Court had in mind when it described the first exception in *R.A.V.* Their argument cannot be squared with the language of *R.A.V.* or with its logic.

Respondents ask the Court to compare the cross-burning statute with 18 U.S.C. § 871, the federal law prohibiting threats against the President. Resp. Br. at 36. The Commonwealth welcomes the comparison. Approved in *Watts* and *R.A.V.*, this content-based restriction on expression provides a benchmark that confirms the constitutionality of the Virginia statute. Five points are significant:

1. Respondents say that § 871 is "grounded in the policy judgment that [a threat against the President] is especially dangerous and damaging to the polity." Resp. Br. at 36. The Virginia statute is grounded in the same sort of policy judgment about the ill effects of intimidation by cross burning. *See* Com. Br. at 21-24.

2. Respondents note that § 871 is "geared to the *identity* of the intended victim." Resp. Br. at 36 (emphasis in original). The Virginia statute protects everyone, the

[7] The three *amici* briefs filed by federal and state authorities concur in Virginia's assessment. United States Br. at 4 ("The association between acts of intimidating cross burning and acts of violence is well documented in recent American history."); Brief of New Jersey and thirteen other States at 1 ("Cross-burning is known by the actors, the victims, and the State governments to cause unique and significant harm."); California Br. at 3 (describing cross burnings as "especially insidious").

weak as well as the powerful. Such universal protection is a point in *favor* of the Virginia law.

3. *R.A.V.* noted that § 871 prohibits *all* threats against the life of the President and does not single out threats based on opposition to particular presidential policies. 505 U.S. at 388. Likewise, the Virginia statute prohibits *all* acts of intimidation by cross burning and does not single out threats based on disagreement over race, religion or any other topic.

4. Respondents say the federal law "does not target expression *as such*, but merely targets the conduct of threatening a specific *target*, the President." Resp. Br. at 36 (emphasis added). Under the Virginia statute, cross burning is not banned unless there is an intent to intimidate. Thus, like the federal law, the Virginia statute does *not* target expression as such, it merely targets the conduct of threatening by a means of a specific *tactic*, cross burning.

5. Respondents fault the Virginia law because it is limited to intimidation by means of a particular symbol. They ignore the fact that the President is *also* a symbol. He is a symbol of the policies he advocates, the government he heads and the nation he leads.[8] Threats against him may reflect – explicitly or implicitly – protected messages of political dissent. Yet, threats against the President are treated more harshly than threats against *other* public leaders even where such threats might reflect *support* for presidential views. Under *Watts* and *R.A.V.*,

[8] The President's status as a symbol is underscored by the fact that ill wishes against his person are recognized by this Court as a protected – albeit crude – form of political expression. *Watts v. United States*, 394 U.S. 705 (1969) (war protestor's statement that, if drafted, he wanted to put Lyndon Johnson in his rifle sights held to be protected political hyperbole); *Rankin v. McPhearson*, 483 U.S. 378 (1987) (deputy sheriff's expression of regret over failure of assassination attempt against Ronald Reagan held to be protected speech).

this sort of "content discrimination" is not problematic. Even though it is possible to design a broader anti-intimidation law that omits any reference to the President, it is not *necessary* to do so. The same is true with cross burning. In both cases, the symbol-focused statute is constitutional because the prohibited symbol-focused threat is one that demonstrates with "special force" why "threats of violence are outside the First Amendment." Both statutes are constitutional.

B. Cross Burning Has an Array of Secondary Effects.

Respondents do not challenge the Commonwealth's judgment that an epidemic of intimidation by cross burnings would spawn other grievous social ills, leading to a breakdown of law and order. *See* Com. Br. at 39. Instead, they maintain that the effects the Commonwealth foresees are not "secondary" within the meaning of the secondary effects doctrine. They are mistaken.

1. The Commonwealth has explained that, unlike the concerns voiced by St. Paul in *R.A.V.*, the social ills identified here are not simply the "emotive impact of speech on its audience." 505 U.S. at 394. Instead, they deal with the effect on law and order in the surrounding community. Thus, they are analogous to the effects identified as secondary in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *See* Com. Br. at 39. Respondents do not address the comparison and suggest no meaningful distinction.

2. Respondents fail to read carefully *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000), which struck down a federal statute that regulated cable broadcasts that were indecent, but fully protected as to adults. In so ruling, the Court rejected a secondary effects argument, noting that the doctrine "has no application to content-based regulations targeting the *primary* effects of *protected* speech. . . . " *Id.* at 815 (emphasis added). The social ills the Commonwealth has identified are not the

primary effects of protected speech. They are the indirect effects of intimidation – secondary effects of unprotected speech. Even if cross burning is assumed to convey dual messages – intimidation wrapped with bigotry – the ills the Commonwealth seeks to prevent are not caused by the message of bigotry, which is protected, but by the intimidation, which is not.[9]

Ultimately, it makes little difference whether the social ills arising from intimidation by cross burning are considered "secondary" or "primary." The key point is that the effects identified by the Commonwealth are *real* – a point respondents do not deny. If these effects are regarded as "secondary" then the secondary effects doctrine – and the second *R.A.V.* exception – are applicable. On the other hand, if those effects are regarded as "primary" then they confirm that cross burning is an especially virulent form of intimidation and underscore why the first *R.A.V.* exception is applicable. In either case, the statute is constitutional.

C. No Official Suppression of Ideas Is Afoot.

As previously discussed, the Virginia statute qualifies for the third *R.A.V.* exception because "there is no realistic possibility that official suppression of ideas is afoot." Com. Br. at 40 (quoting *R.A.V.*, 505 U.S. at 390). Respondents dispute this conclusion by glossing over important distinctions and by singing lofty panegyrics that do not provoke disagreement so much as they leave one searching for analysis about the case at bar.

The parties agree that legislative purpose is irrelevant in determining whether a statute is content-neutral. Com. Br. at 17-21; Resp. Br. at 19-22. But, if a statute is deemed

[9] Respondents also cite *Boos v. Barry*, 485 U.S. 312 (1988), and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Both cases involved only protected speech. Neither case involved intimidation.

content-based, legislative purpose becomes useful in determining whether official suppression of ideas is afoot. As an historical matter, the purpose of the Virginia statute was to prohibit intimidation, not to suppress ideas of racial bigotry. *See* Com. Br. at 21-24. This fact – unchallenged by respondents – is one of *several* reasons why the statute qualifies for the third *R.A.V.* exception. *See* Com. Br. at 40-41.

Also telling is respondents' failure to explain just what idea they contend is being suppressed. They seek to excuse this omission by saying the disfavored concept is "less determinate" and has a "wider range of meanings" than language might convey. Resp. Br. 38. Such an amorphous position cannot possibly form the basis for a constitutional rule. Their only coherent claim is that intimidation by cross burning is analogous to "intimidation through flag-burning." Resp. Br. 38. Yet, this claim is simply wrong. It ignores the critical distinction between these two symbolic uses of fire. *See supra* at 3-4.

III. THE STATUTORY INFERENCE IS CONSTITUTIONAL.

Respondents argue that the statutory inference in the Virginia statute makes the law overbroad. They are mistaken. Under this Court's jurisprudence, before a statute may be invalidated for overbreadth, the alleged overbreadth must "not only be *real*, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973) (emphasis added). As previously shown, the Virginia Supreme Court erred in the first part of the analysis, and it essentially disregarded the second. Com. Br. at 46-48. Respondents fail to repair these flaws. They can prevail only by an unwarranted expansion of the overbreadth doctrine.

A. There Is No Real Overbreadth.

To identify real overbreadth, this Court has consistently focused on the challenged statute's *prohibitory* terms, asking whether those terms are so broad – or so vague – as to forbid expression that is constitutionally protected. *See* Com. Br. at 46. No one has suggested that the Virginia statute is vague, and its prohibitory terms are not violated unless there is intimidation – a type of expression that is unprotected. Thus, there is no real overbreadth here.

Respondents offer three arguments. First, they ask the Court to carry the search for overbreadth *outside* of the prohibitory terms of the statute, an approach they suggest is supported by two cases: *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), and *Stromberg v. Carlson*, 283 U.S. 359 (1931).[10] Second, respondents appear to suggest that some acts of intimidation may be protected under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Third, they compare the Virginia statute to discredited laws imposing a *per se* ban on certain statements. None of these arguments have merit.[11]

---

[10] Respondents also say that, if the statutory inference is found invalid, they may not be retried. Resp. Br. at 35 n.32. They are mistaken. A decision invalidating the statutory inference would not change any element of the offense and, if a jury has been improperly instructed, the proper remedy is a new trial under correct instructions. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979) (remanding case to Montana Supreme Court after reversing conviction based on invalidity of statutory inference); *Sandstrom v. Montana*, 603 P.2d 244, 245 (Mont. 1979) (remanding case for new trial). Respondents are also mistaken in their view that the severability argument has been waived. Resp. Br. at 39 n.32. The Commonwealth argued below that the Virginia statute is not invalid on its face and, under this Court's jurisprudence, a statute may not be deemed facially invalid if a limiting construction – including severance – would save it.

[11] In a footnote, respondents also claim that the statutory inference led the sheriff who arrested Black to disregard the intent element and

(Continued on following page)

1. As explained in depth by one of the *amici*, the overbreadth doctrine "should, at the very least, be kept on a tight leash." Criminal Justice Legal Foundation Br. at 5. To search for overbreadth by looking outside a statute's prohibitory terms would cut the leash altogether. *See* Com. Br. at 44. Neither *Ashcroft* nor *Stromburg* supports respondents' desire for such an approach.

a. In *Ashcroft*, this Court struck down a newly-enacted federal ban on "virtual" child pornography. In doing so, the Court focused on the statute's prohibitory terms and found they banned speech that was constitutionally protected. This proposition – essential to the result in *Ashcroft* – has no counterpart in the case at bar. The Virginia statute *only* bans cross burning where there is an intent to intimidate, and intimidation may be proscribed. In short the Virginia statute stands in stark contrast to the federal statute at issue in *Ashcroft* because, unlike the federal statute, the Virginia statute does not ban *any* constitutionally protected speech.

Ignoring the fundamental failure of their analogy, respondents nevertheless try to equate the statutory inference in Virginia's statute with the affirmative defense available under the federal law. The effort fails. The affirmative defense found deficient in *Ashcroft* was only available to those charged with *producing* the pornography. It was not available to those charged with *possessing* it, nor was it available to those who produced the pornography using *computers* rather than adult actors. *Ashcroft*, 122 S. Ct. at 1405. In other words, even with the

---

to act as if cross burning alone is a crime in Virginia. Resp. Br. at 44 n.34. The record does not support this conclusion. By telling Black "there's a law . . . that you cannot burn a cross," J.A. 74, the sheriff was not attempting to recite the elements of the offense (he did not mention the "public place" element either) but was merely informing Black in general terms about the reason for his arrest.

affirmative defense, the statute still prohibited a substantial amount of protected speech and so remained overbroad. Describing it as "incomplete and insufficient," the Court held that the affirmative defense could not save the statute. *Id.*[12]

The Virginia statute is not analogous. Unlike the federal statute in *Ashcroft*, its prohibitions are not overbroad. The evidentiary inference does not render them so, any more than the affirmative defense in *Ashcroft* could make overbroad prohibitions constitutional. Under the Virginia statute, if the intent to intimidate is not established – and the burden rests on the prosecution – a defendant must be acquitted. *See* J.A. 195, 250 (jury instructions). Because the Virginia statute does not prohibit *any* protected speech, *Ashcroft* offers respondents no support.

b. Respondents' invocation of *Stromberg* is likewise ill-conceived. The California statute at issue in that case prohibited expressive conduct – display of a red flag – when undertaken for any one of three purposes. A jury found Stromberg guilty of violating the law, but did not specify which of the three unlawful purposes was the basis for its decision. This Court held that two of the three purposes involved activities that could be legitimately prohibited, but that the third purpose involved protected expression. Unable to determine whether the guilty verdict rested on speech that was protected or proscribable, the Court overturned the conviction. Such ambiguous jury verdicts are not possible under the Virginia statute

[12] Contrary to respondents' suggestion, the Court expressly declined to decide whether the burden of an affirmative defense could ever be constitutionally imposed on a speaker. *Id.* at 1405. It certainly did not reach such a conclusion about a mere statutory inference.

because a conviction for cross burning cannot be supported by alternative purposes. There must be an intent to intimidate, and intimidation is not protected. *Stromberg* is simply irrelevant.

2. Respondents then turn to *Brandenburg*, where this Court recognized that the Constitution limits the extent to which government may forbid speech that advocates using force or violating the law. Their argument appears to be that the Virginia statute is overbroad because it bans *all* cross burning with intent to intimidate, whether or not a particular incident is likely to produce imminent lawless action. If this is their argument, they are wrong. While the advocacy of force and violence may be protected in some limited circumstances, intimidation never is. *See Black v. Commonwealth*, 553 S.E.2d 738, 755 (Va. 2001) (Hassell, J., dissenting), J.A. 308.[13]

Brandenburg protects the advocacy of force and violence where the evils to be avoided – force and violence – depend on additional action by the speaker and/or his sympathizers. Thus, those evils are at least one step removed from the speech in question. Given this margin of safety, rhetorical excess is tolerated. But, where individuals seek to intimidate, the evils to be avoided – *fear* of

[13] In stark contrast to the Supreme Court's decision in *Brandenburg*, we are not concerned here with abstract teaching regarding the moral propriety or even moral necessity of violence as a means for accomplishing political reform. Rather, the subject of this case is . . . a statute which proscribes the burning of a cross with the intent to intimidate, which we have held means to place the victim in fear of bodily harm.

Black, 553 at 755 (Hassell, J., dissenting), J.A. 308. Because it ruled against the Virginia statute on other grounds, the majority decision did not reach the *Brandenburg* issue.

bodily injury and the consequences of such fear – depend on nothing more than the communication reaching its intended audience. No additional action by the speakers is required. Thus, *Brandenburg* does not apply.[14]

Even so, respondents seem to be arguing that intimidation is constitutionally protected unless the person making the threat is on the verge of carrying it out or the threat is likely to instill fear in its victim. Such an approach would be a radical departure from this Court's jurisprudence. For example, under their approach, a threat against the life of the President would be protected speech – no matter how seriously it was intended – unless the perpetrator actually had the means to act on his designs and/or induced actual fear on the part of the President. This is obviously not the approach followed in *Watts*, where this Court approved the statute banning threats against the President, qualifying it only to distinguish between "true threats" and "political hyperbole." 344 U.S. at 707.[15] Nowhere has this Court ever suggested that the Constitution protects those who communicate a threat with an intent to intimidate. It should not do so now.

3. In a final, broad-brush argument, respondents contend that it is simply impermissible for Virginia to permit a jury to infer that the act of cross burning conveys an intent to intimidate. Again they miss the mark.

a. Respondents accuse Virginia of acting by "fiat," and they compare the cross-burning statute to laws penalizing the "mere utterance or display" of "a certain word, symbol or phrase." Resp. Br. at 46-47. Yet, the Virginia statute does *not* penalize the "mere display" of a

[14] *See* Criminal Justice Legal Foundation Br. at 10-11.

[15] The Virginia statute needs no such judicial gloss. By its own terms, it is limited to cases where there is an intent to intimidate, and "intimidation" under Virginia law means acts that put the victim in fear of bodily harm. *See* Com. Br. at 13 n.6.

burning cross. It requires an intent to intimidate. Moreover, use of the word "fiat" implies that Virginia has acted arbitrarily, but that is simply not so. The connection between cross burning and the intent to intimidate is obvious to anyone familiar with our history. *See T.B.D.*, 656 So. 2d at 481; *compare* United States Br. at 3-5 (detailing historical correlation between cross burning and violence) *with* Resp. Br. at 24 (accepting historical correlation).

b. Respondents quote several cases for the undisputed proposition that, in the area of First Amendment law, legislative determinations are subject to judicial review. *See* Resp. Br. at 47 n.38. Yet, they fail to take the next step and acknowledge that judicial review of statutory inferences is governed by a well-established two-part standard. Specifically, a statutory inference is constitutional if (i) the state retains the burden of proof on the fact to be presumed, and (ii) "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Barnes v. United States*, 412 U.S. 837, 842 (1973) (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969)) (internal quotation marks omitted). Respondents' failure to address this standard is particularly revealing because the Commonwealth expressly called it to their attention. Com. Br. at 42 n.24. The fact is that the statutory inference meets this test.[16] The prosecution retains the burden of proving intent, and the presumed fact – an intent to intimidate – is more likely than not to flow from

[16] If such an inference is not permitted in the statute, it is questionable whether it could be permitted in practice. In other words, it would be doubtful whether the prosecution's case could survive a motion to strike where the cross burning – though intended to intimidate – was perpetrated by individuals clever enough to do so without providing any indicia of their intent other than their already fearsome message.

the proved fact – burning a cross in one of the proscribed venues.

B. There Is No Substantial Overbreadth.

Even if respondents were able to demonstrate real overbreadth, they have not demonstrated – nor have they attempted to demonstrate – that such alleged overbreadth is "*substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick,* 413 U.S. at 615 (emphasis added). *See* Com. Br. at 46-48. For this reason, too, the overbreadth challenge must fail.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief of petitioner, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

MAUREEN RILEY MATSEN
WILLIAM E. THRO
Deputy State Solicitors

ALISON P. LANDRY
CHRISTY A. MCCORMICK
Assistant Attorneys General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

October 9, 2002